U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 22 2009
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a finding of fraud and material misrepresentation.

The petitioner is a brokerage house for cargo. It seeks to employ the beneficiary permanently in the United States as a marketing manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. baccalaureate in business administration or a foreign equivalent degree.

On appeal, prior counsel asserted that the beneficiary's combined education is sufficient. On April 7, 2009, this office advised the petitioner of our intent to invalidate the underlying alien employment certification and issue a formal finding of fraud. The petitioner has now responded. For the reasons discussed below, we uphold the director's basis of denial. Moreover, while the petitioner has overcome our concerns regarding its stated gross income on various petitions, the petitioner has not overcome our concern regarding the petitioner's misrepresentation of the beneficiary's interest in and role with the petitioning company on the ETA Form 9089. Thus, we will invalidate the alien employment certification and enter a formal finding of fraud.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign two-year Advanced Diploma in Public Administration and Management awarded by Nottingham Trent University of the United Kingdom in cooperation with the School of Public Administration in Azerbaijan in 1998. The beneficiary also possesses a "Master of Electrical Engineering" diploma issued in 1986 after five years of education at Odessa High Engineering Marine School in the Ukraine. The petitioner initially submitted an evaluation from [redacted] at SDR Educational Consultants. [redacted] concludes that the beneficiary completed a "first degree program" in engineering and that the advanced diploma "may be accepted as comparable to completion of a second area of specialization; that is, a Bachelor of Business Administration degree with an area of specialized studies in Management and Human Resource Management." [redacted] does not indicate what education was required for entry into the advanced diploma program.

In response to the director's request for additional evidence, the petitioner submits a new evaluation from [redacted] of Seattle Pacific University and [redacted] of the Foundation for International Services, Inc., who bases her evaluation on the opinion of [redacted] concludes that the beneficiary completed the necessary general education and general background in business for a baccalaureate during his engineering program, which [redacted] equates to a U.S. Master of Science degree in Engineering, and the necessary advanced courses in business administration from Nottingham Trent University. Thus, [redacted] concludes that the beneficiary has the equivalent of a U.S. baccalaureate in business administration. [redacted] basing her evaluation on [redacted] letter, reaches the same conclusion.

The director did not contest that the beneficiary has at least a baccalaureate in engineering. The petitioner, however, has not established that the beneficiary has five years of progressive post-baccalaureate experience as an engineer. Even if we accepted that the beneficiary has a Master's degree in engineering and, thus, qualifies as an advanced degree professional engineer, the petitioner does not seek to employ the beneficiary as an engineer. An alien cannot be classified as a professional if he does not seek employment in the profession for which he has the necessary education. *Matter of Shah,* I&N Dec. 244, 247 (Reg'l. Comm'r. 1977).

Thus, the issue is whether the beneficiary's advanced diploma is a foreign degree equivalent to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the alien employment certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In response to the director's request for additional evidence, prior counsel relied on a letter from Mr. [redacted], Director of the Business and Trade Services Branch of the U.S. Citizenship and Immigration Services (USCIS) Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate

Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000) (copy incorporated into the record of proceeding).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 245. This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation

required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1]

In order to have the experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). While prior counsel asserted on appeal that nothing in the statute or regulation requires a single degree, it is a rational interpretation of the regulation at 8 C.F.R. § 204.5(k)(2). *See Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *11 (D. Ore. Nov. 30, 2006).

As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

The petitioner has not established that the two-year advanced diploma program at Nottingham Trent University is designed to build upon previous tertiary education, such as by establishing that the program requires at least the equivalent of an associate's degree for entry, or that it is normally a four-year program for which the beneficiary had earned advanced standing based on his previous education. Thus, we are not persuaded that the beneficiary's advanced diploma is a foreign equivalent degree to a U.S. baccalaureate.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" in the profession in which he seeks to engage, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)[(5)]. **The INS then makes its own**

> determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany,* 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in business administration is the minimum level of education required. Line 6 reflects that five years of experience in the job offered is required. Line 8 provides that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

Even if we accept prior counsel's assertion on appeal that the beneficiary has a foreign equivalent degree to a U.S. Master of Science degree in Engineering, the job requires a bachelor's degree in Business Administration. For the reasons discussed above, the petitioner has not established that the beneficiary's advanced diploma in public administration and management is a foreign equivalent degree to a U.S. Bachelor of Business Administration. Thus, the beneficiary does not meet the job requirements certified by DOL.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these

reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Beyond the decision of the director, we find that the petitioner and beneficiary made material misrepresentations regarding the beneficiary's interest in and role with the petitioning company on the ETA Form 9089. Specifically, the petitioner's explanations for these inconsistencies, noted in our previous notice, are not credible or supported by competent objective evidence. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

I. Material Misrepresentations Regarding the Petitioner's Ability to Pay the Proffered Wage

In the April 7, 2009 notice, the AAO stated that it had reviewed the immigrant and nonimmigrant petitions filed in behalf of the beneficiary and that there existed "several egregious discrepancies with respect to the gross income" that the petitioner declared to USCIS and to IRS since 2005. Specifically, the AAO noted that the petitioner listed its gross income on several Form I-129 nonimmigrant worker petitions and one Form I-140 immigrant worker petition as follows:

Date of Filing	Gross Income	Receipt Number
January 18, 2005	$1,138,336	SRC-05-072-53200 (Form I-129)
October 6, 2006	$1,138,336	LIN-07-012 51514 (Form I-140)
March 7, 2008	$7,498,667	EAC-08-110-51154 (Form I-129)
January 16, 2009	$13,304,237	EAC-09-071-51264 (Form I-129)

The AAO further noted, however, that the petitioner's IRS Forms 1120 reveal the following claimed gross income for the same time period:

Tax Year	Date Signed by Preparer or Petitioner	Gross Income
2005	August 30, 2006	$ 7,776,342
2006	August 27, 2007	$ 7,498,667
2007	August 28, 2008	$13,304,237

The AAO concluded that the petition filed on January 18, 2005 should reflect the petitioner's 2004 gross income and that the petition filed on October 6, 2006 should reflect the petitioner's 2005 gross income and questioned why these amounts were identical. The AAO further noted that while the petitioner prepared a tax return on August 30, 2006 reflecting a gross income of $7,776,342, two months later, the petitioner declared only $1,138,336 in gross income on the Form I-140 petition it was filing.

In response, the petitioner submits a letter from [redacted], one if its directors. [redacted] asserts that the gross income listed on the petition filed in January 2005 was the petitioner's 2003 gross income, the most recent available. [redacted] further asserts that the gross income listed on the October 2006 petition was incorrect but that the correct gross income was provided in the petitioner's letter accompanying the petition.

statements are supported by the record and we are satisfied that there was no material misrepresentation regarding the petitioner's gross income.

II. Material Misrepresentations on the Labor Certification ETA Form 9089 Regarding Ownership

On the ETA Form 9089, Part C, line 9, the petitioner indicated that the employer was not a closely held corporation, partnership or sole proprietorship in which the alien has an ownership interest, nor was there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators and the alien.

In support of the petition, the petitioner submitted its 2005 and 2006 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns. In 2005, Schedule E, Schedule K (Statement 4) and Form 5472 all identify the beneficiary as the petitioner's sole shareholder. In 2006, the beneficiary is no longer listed as the sole shareholder on Schedule E. Rather, [redacted] is listed as the 75 percent owner and is listed as the 25 percent owner. The 2006 Schedule K, however, indicates that one individual owns 100 percent of the petitioning corporation. Statement 4 names the beneficiary as the 100 percent owner. Form 5472 lists [redacted] as the only 25 percent foreign shareholder.

On the ETA Form 9089, Section F, the petitioner indicated that the proffered position is marketing manager. In support of the petition, the petitioner also submitted a letter from [redacted] asserting that the petitioner currently employs the beneficiary as its marketing manager, the proffered position. On the ETA Form 9089, Section K, the beneficiary indicated he has held that position since March 27, 2002. The petitioner's 2005 Texas Franchise Tax Public Information Report, however, lists the beneficiary as the petitioner's president. The Texas Comptroller of Public Accounts' website, http://ecpa.cpa.state.tx.us (accessed February 3, 2009 and incorporated into the record of proceeding), indicates that the beneficiary is still the petitioner's president and a director. The AAO noted the lack of corporate ledgers supported by transactional evidence such as wire transfer receipts or canceled checks or other objective, consistent and credible documentation confirming a change in ownership between 2005 and 2006.

A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden *when asked* to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545

(BALCA 1987). [redacted], recruiting manager, signed the ETA Form 9089 on July 10, 2006, thus certifying under penalty of perjury with respect to the entire Form ETA 9089, that "the information contained herein is true and correct." However, based on the above information, the AAO concluded that [redacted] has made significant, material misrepresentations regarding the beneficiary's ownership interest as well as his current and proposed position in the company in response to Section C, question 9, and Section F of ETA Form 9089.

Finally, the AAO advised that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO concluded that without a resolution of the above discrepancies and credible evidence documenting a transfer of ownership between 2005 and the filing date of the ETA Form 9089, June 21, 2006, we must conclude that the petitioner presented false information on the ETA Form 9089.

In response, counsel asserts that the beneficiary was not an owner or shareholder of the petitioning company when the ETA Form 9089 was filed and that, in fact, no shares were issued until 2007. Counsel further asserts that a foreign company, Silk Way Airlines, has actually owned the petitioning company since 2005 when it acquired the company from Eurasian Air Service, Inc. In addition, counsel asserts that on June 1, 2007, after the ETA Form 9089 was filed, shares were issued to [redacted] and the beneficiary as "nominal owners for the benefit of Silk Way." Counsel continues that the tax returns are inaccurate because the information on ownership was supplied to the accountant by the beneficiary's wife, who did not have accurate information and was advised by the accountant that the ownership information was not important because no dividends had been paid.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). In support of counsel's assertions, the petitioner submits several letters and corporate documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

[redacted] asserts that it was his "understanding" that as of 2005, Silk Way Airlines managed the company with [redacted] as the senior manager and the beneficiary as the marketing manager. [redacted], Director of Silk Way Airlines, asserts that prior to 2005, the Eurasian Group of Companies had been managed as part of Azerbaijan Airlines Cargo and that in 2005, Silk Way Airlines acquired the group and began consolidating its ownership in each individual company. [redacted] affirms that in June 2007, [redacted] and the beneficiary were directed to hold shares on behalf of Silk Way Airlines.

The petitioner submitted its IRS Form 1120 tax returns for 2002 through 2004. In 2002, Schedule E is blank and Schedule K indicates that the company was 50.8 percent owned by a foreign person. No accompanying statement or Form 5472 was submitted identifying that foreign person. In 2003, the beneficiary is identified as the sole officer on Schedule E. While Schedule K indicates a foreign person owns 50 percent of the petitioner, no statement or Form 5472 was submitted identifying that foreign person. In 2004, the beneficiary is identified as the sole officer and shareholder. He is also identified as the sole owner on statement 3 and Form 5472. The petitioner also submits a new IRS Form 1120 tax return for 2006 identifying the beneficiary as the sole shareholder on Schedule E, statement 4 and Form 5472. This new 2006 return, while removing the inconsistencies on the previously submitted copy, does not support the petitioner's position that the beneficiary did not own any of the petitioning company in 2006 when the ETA Form 9089 was filed. The petitioner also submitted its 2007 IRS Form 1120 tax return. On this return, the beneficiary is listed as owning no shares on Schedule E. Statement 3 lists [redacted] as the 75 percent owner. No Form 5472 was submitted. This return is not consistent with [redacted] assertion that the nominal shareholders for Silk Way Airlines are [redacted] and the beneficiary. Significantly, the instructions for Form 5472 state that the rules of constructive ownership cannot be used so as to consider a U.S. person as owning stock that is owned by a foreign person, which is what the 2007 return appears to be doing if Silk Way Airlines truly owns the petitioning company.

The petitioner submitted the 2000 Articles of Incorporation for the petitioner listing the beneficiary as an initial member of the Board of Directors. The petitioner also submitted promotional materials for Eurasian Cargo Group (EASC). While these materials are undated, they refer to Silk Way Airlines only as a customer, noting that the airline chose EASC as its sales agent and representatives in 2001. The petitioner also submitted corporate documents for a company with the same name as the petitioner in New York. [redacted] is the sole shareholder of this company and the petitioner has not established the relevance of this documentation to the ownership of the petitioner, a Texas corporation.

The petitioner also submitted a copy of his business card listing the company as EASC. The card includes the logo for Silk Way Airlines, Azerbaijan Airlines and "Houston, USA: Official Representation of Silk Way and Azerbaijan Airlines." Nothing on this card suggests that Silk Way Airlines owns the petitioner. Regardless, a business card is not the type of competent objective evidence that might resolve the above discrepancies.

The petitioner also submitted ledger entries and share certificates 1 and 2 dated June 1, 2007 whereby [redacted] received 7,000 shares and the beneficiary received 3,000. While the petitioner may not have issued share certificates prior to 2007, we are not persuaded that prior to that time, the petitioner, formed in 2000 and capitalized no later than 2004 (the first year for which Schedules L have been submitted), had no owners.

In addition, the petitioner submitted a letter from [redacted] of Euroasian Air Service, Inc. asserting that this company was an original shareholder of the petitioning company based on a fifty percent equity purchase of $1,990 on May 31, 2001 and that it sold its interest to Silk Way Airlines

in 2005. In support of this assertion, the petitioner submitted evidence of the transfer of these funds on May 31, 2001. The purchase of equity, however, is not the sole reason one company might transfer money to another company. Even if no shares were issued at the time, the petitioner has not explained why no other documentation, such as a contract or corporate resolution from 2001, documents this purchase of equity. [redacted] does not explain why his company would purchase equity and request no evidence of that purchase. Moreover, the record lacks evidence of the sale of this equity to Silk Way Airlines in 2005, such as a contemporaneous contract or transactional evidence. We note that the capitalization of the petitioner did not change in 2005 or 2006 according the Schedules L in the record. Finally, as [redacted] is only discussing a 50 percent interest, his letter does not preclude the beneficiary's ownership interest in the petitioning company, an ownership interest that, unlike that of EASC, is documented on the petitioner's tax returns.

The petitioner also submitted a 2009 resolution by Silk Way Airlines accepting the resignation of its managing director, [redacted] While this resolution references a 2002 document evidencing ownership of "Euro-Asian," a joint stock company with its head office in Luxembourg, this document does not establish that Silk Way Airlines has owned 100 percent of the petitioning company as of 2005 as claimed.

Finally, the petitioner submits two letters purporting to explain why the petitioner's tax returns have listed the beneficiary as the owner if, in fact, he is not. First, the beneficiary's wife, [redacted] asserts that while not an officer of the petitioning company, she has assisted with providing information to the company's accountants since "at least in 2005." [redacted] asserts that she had no knowledge of the company's ownership but was told by the accountant that this information was not important if there were no tax consequences, as when the company pays no dividends. As the company was "very busy," [redacted] asserts that she gave her best guess.

Second, [redacted], the accountant who signed all of the petitioner's tax returns as the preparer, asserts that "the ownership of the company" was unclear at the time the tax returns were prepared. [redacted] further asserts that when the beneficiary subsequently advised her that the ownership information was incorrect, she advised that it would not have any affect on the amount of tax owed but that the return should be amended. Significantly, she asserts that she began preparing the amended returns but was advised to "suspend the work pending solution of unresolved issues." She does not confirm taking information from the wife of an officer of the corporation rather than the corporate officers themselves or advising at the time of preparation that the ownership information was not important. She professes no personal knowledge of the ownership of the corporation at any time, including currently.

The explanations in these letters are insufficient and unsupported by the competent objective evidence required to overcome discrepancies. *Matter of Ho*, 19 I&N Dec. at 591-92. The record is absent any explanation for why the petitioner would rely on someone with so little knowledge of the company that she does not even know who owns it to provide the necessary information to the accountant for the tax returns. Moreover, the tax returns must have been signed by an officer prior to filing with the IRS. Thus, the officer should have verified the most basic information on those

returns. Finally, the record lacks evidence as to why the petitioner requested that [redacted] suspend the preparation of amended tax returns if, in fact, the returns are merely being amended to reflect the accurate ownership of the petitioner. Neither [redacted] nor [redacted] explains what "unresolved issues" need resolution before the returns can be amended.

Ultimately, the petitioner submitted signed tax returns with the IRS listing the beneficiary as at least a partial owner in several years. While the 2006 tax return submitted in response to the director's request for additional evidence, which covers the year the ETA Form 9089 was filed, contains conflicting information, it does list the beneficiary as the sole owner on statement 4. The new 2006 return submitted in response to our April 7, 2006 notice consistently lists the beneficiary as an owner. Moreover, the petitioner must overcome the inconsistencies on the orignial 2006 return with competent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner failed to do so. Specifically, the record still lacks transactional evidence of an investment by Silk Way Airlines in 2005 or a contemporary corporate resolution approving the sale. The record also lacks a contract whereby the beneficiary agrees to act as a nominal shareholder for Silk Way Airlines. Once again, it is not clear why Silk Way Airlines would agree to an ownership interest that is undocumented in any form.

As noted above, the issue of whether the beneficiary owns any interest in the petitioning company is material to DOL. As the petitioner has not overcome our finding that it misrepresented the ownership of the company to DOL on the ETA Form 9089, we invalidate the alien employment certification pursuant to 20 C.F.R. § 656.30(d). We note that precedent exists for invalidating the alien employment certification at the appellate stage. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm'r. 1986).

III. Material Misrepresentations on the Labor Certification ETA Form 9089 Regarding Proffered Position and Alien Work Experience

On January 28, 2005, the petitioner filed an H-1B nonimmigrant visa petition in behalf of the beneficiary, receipt number SRC-05-072-53200. In support of that petition, the petitioner submitted a November 29, 2001 letter from Transcontinental Baku indicating that the beneficiary worked as a "General Director" from July 11, 2000 until April 2, 2001. On the ETA Form 9089, Part K, however, the beneficiary indicated that he worked for Transcontinental Baku from June 1, 2000 through March 1, 2002 as a marketing manager. The petitioner submitted a new 2006 letter from Transcontinental Baku purporting to confirm the same information. The AAO concluded that the record did not resolve the inconsistency in the dates and job title for the beneficiary's employment at Transcontinental Baku.

In addition, on the ETA Form 9089, Section F, the petitioner indicated that the title of the proffered position is marketing manager. The petitioner also submitted a letter from [redacted] asserting that the petitioner currently employs the beneficiary as the petitioner's marketing manager, the proffered position. On the ETA Form 9089, Section K, the beneficiary indicated he has held that position since March 27, 2002. [redacted] signed the ETA Form 9089 on July 10, 2006, thus certifying under penalty of perjury with respect to the entire ETA Form 9089, that "the information contained herein is true and correct." In addition, the beneficiary signed the same ETA Form 9089 on September 28, 2006,

also certifying under penalty of perjury with respect to information in Sections J and K that "the information contained herein is true and correct." The AAO noted, however, that the petitioner's 2005 Texas Franchise Tax Public Information Report lists the beneficiary as the petitioner's president, and the Texas Comptroller of Public Accounts' website indicates that the beneficiary is still the petitioner's president and a director.

In response, counsel asserts that the beneficiary carried out the duties of both general director and marketing manager for Transcontinental Baku. The petitioner submits corporate resolutions by Transcontinental Baku appointing the beneficiary as its General Director as of May 1, 2000. The petitioner also submitted a letter from [redacted] Commercial Director of Transcontinental Baku. He explains that the minor discrepancy in start dates is due to the petitioner's date of hire versus the date he began employment and that, as General Director, the beneficiary's duties were primarily those of a marketing manager. [redacted] further asserts that the beneficiary transferred his director duties to another employee in April 2001. This documentation appears to resolve the inconsistency in employment duties and dates for Transcontinental Baku.

Counsel further asserts that the petitioner is a small company that requires the employees to fulfill multiple roles. Counsel notes that the articles of incorporation require a president but that the beneficiary's duties were primarily those of a marketing manager. [redacted] asserts that he was the senior manager responsible for managing the U.S. company and that the beneficiary was the marketing manager but that they both managed the office due to its small size. The petitioner also submitted a May 18, 2007 action plan for Eurasian Cargo Group indicating that instructions reflecting the rights and obligations of the representative offices would be prepared in the following two months.

We acknowledge that it is plausible for the president to also serve as the company marketing manager. Significantly, however, Section K(b) of the ETA Form 9089 indicates that [redacted] was the beneficiary's supervisor. This statement conflicts with the tax returns that show the beneficiary earning nearly twice [redacted] salary in 2005 and far more than [redacted] salary in 2006. Given the misrepresentation about the beneficiary's ownership of the petitioner, the information regarding the beneficiary's job title and supervisor demonstrates a pattern of minimizing the beneficiary's role with the petitioner, consistent with an attempt to avoid a higher burden of proof before DOL in demonstrating that the job was open to U.S. workers. 20 C.F.R. § 656.17(l). As the beneficiary signed the ETA Form 9089 verifying the information in Section K, the beneficiary is complicit in this misrepresentation.

In light of the above, we are also making a formal finding of fraud. As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92. In this case, we find substantial and probative evidence that the petitioner and the beneficiary misrepresented the beneficiary's interest in and role with the petitioning company. The petitioner and the beneficiary signed the ETA Form 9089 under penalty of perjury and attested that the information on that form is true and accurate.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

By misrepresenting the beneficiary's interest in and role with the petitioning company, the petitioner has sought to procure a benefit provided under the Act. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the information on the ETA Form 9089 regarding the beneficiary's interest in and role with the petitioning company is false, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed with a finding of fraud and willful misrepresentation of a material fact on the part of the petitioner, [redacted], and the beneficiary, [redacted]

FURTHER ORDER: The AAO finds that the petitioner, [redacted], and the beneficiary, [redacted] knowingly submitted documents containing false statements in an effort to mislead DOL, USCIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.

FURTHER ORDER: The alien employment certification, ETA Form 9089, ETA case number [redacted] filed by the petitioner is invalidated.